STATE OF MICHIGAN

COURT OF APPEALS

BOBBY BURLESON, Petitioner-Appellant,	FOR PUBLICATION May 12, 2011
v	No. 292916 Ingham Circuit Court
DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent-Appellee.	LC No. 08-001507-AA Advance Sheets Version

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

This case turns on whether the Michigan Legislature intended that state regulation of our Great Lakes shorelines extends to the natural ordinary high-water mark. The majority circumscribes the state's regulatory jurisdiction to fixed elevations above sea level defined by the International Great Lakes Datum (IGLD) for the year 1955, a level that MCL 324.32502 labels an "ordinary high-water mark." Because the Legislature deliberately inserted the word "natural" to delineate the scope of the state's ordinary high-water mark jurisdiction, I respectfully dissent.

In 1995, our Legislature enacted in MCL 324.32501 *et seq*., the Great Lakes submerged lands act (GLSLA). "[T]he GLSLA establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine." *Glass v Goeckel*, 473 Mich 667, 683; 703 NW2d 58 (2005). MCL 324.32502, part of the GLSLA, commences with a broad designation of "[t]he lands covered and affected" by the act, generally describing them as "all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in." The GLSLA then sets forth the core principles governing its interpretation:

> This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing,

> swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. [MCL 324.32502.]

This sentence underscores the Legislature's intent that the state serve as a steward of the shores of our Great Lakes. The sentence's first clause posits, "This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section . . . ." I cannot envision a clearer directive. The second clause recognizes the interests of private littoral owners, but establishes no rights or entitlements. It merely states that the GLSLA "provide[s] for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands . . . ." The third clause returns to the public interest theme introduced in the first clause, reiterating that although private owners possess a property right to fill in "patented submerged lands," the exercise of this and other property rights remains contingent on the state's determination

> that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.

Preservation of the precious Great Lakes as a public resource animates the Legislature's prescribed construction of the GLSLA.

My construction of the next two sentences of MCL 324.32502 flows directly from the principles guiding the GLSLA's interpretation. After establishing the act's general purview, the Legislature set forth the reach of the state's jurisdiction as follows:

> The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes *lying below and lakeward of the natural ordinary high-water mark*, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. [*Id*. (emphasis added).]

This language contains no hint of ambiguity. The sentence clearly expresses the meaning that the natural ordinary high-water mark determines the state's regulatory authority. The Legislature selected the natural ordinary high-water mark as the boundary line of state jurisdiction because this reference point most securely safeguards the public's interest in the shores of the Great Lakes.

The natural ordinary high-water mark delineates a distinct point on the land created by the continuous action of water and evidenced by physical characteristics including the appearance of the soil surface, vegetation changes, and the presence of debris. *Glass*, 473 Mich at 691; 33 CFR 329.11(a)(1). In *Glass*, the Michigan Supreme Court observed that the term "ordinary high-water mark" derives from "the common law of the sea," which governs waters with regular high and low tides. *Glass*, 473 Mich at 690. Despite the absence of tides in the

lakes surrounding Michigan, the common law has long applied the term to the Great Lakes in light of the recurrent and sometimes substantial fluctuation in their water levels. *Id*. at 691, 693. The Supreme Court described as follows the legal pedigree of the ordinary high-water mark:

> The concepts behind the term "ordinary high water mark" have remained constant since the state first entered the Union up to the present: boundaries on water are dynamic and water levels in the Great Lakes fluctuate. In light of this, the aforementioned factors will serve to identify the high water mark, but the precise location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact. [*Id*. at 693-694.]

The natural ordinary high-water mark may prove difficult to locate on a shoreline, but it occupies a firmly entrenched position in the common law.[1]

My interpretation of the term "natural ordinary high-water mark" derives from bedrock principles of statutory construction:

> The Court's responsibility in interpreting a statute is to determine and give effect to the Legislature's intent. The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute. Once the Court discerns the Legislature's intent, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed. [*People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009) (quotation marks and citation omitted).]

Each word of a statute is "presumed to be made use of for some purpose, and, so far as possible, effect must be given to every clause and sentence." *Univ of Mich Bd of Regents v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). This Court may not substitute or redefine a word chosen by the Legislature or assume that the Legislature mistakenly used one word or phrase instead of another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931); *People v Crucible Steel Co of America*, 150 Mich 563, 567; 114 NW 350 (1907).

> A well recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown. [*People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921).]
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> In addition,

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[1] The parties do not dispute that neither Bobby Burleson nor the Department of Environmental Quality has sought to ascertain the location of the natural ordinary high-water mark on Burleson's property.

> [a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning. [MCL 8.3a.]

In the GLSLA, the Legislature unambiguously selected the "natural ordinary high-water mark" as the boundary for "[t]he lands covered and affected" by the act. The Legislature's incorporation of the modifier "natural" signaled its intent that benchmarks created by nature, such as eroded soil and altered patterns of vegetation, demarcate the extent of the jurisdiction of the Department of Environmental Quality (DEQ). And given that the term "natural ordinary high-water mark" represents both a centuries-old legal term of art and a concept well known to surveyors, I presume that the Legislature understood the meaning and significance of the language it included in MCL 324.32502.[2]

The last sentence of MCL 324.32502 reads: "For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet." With this sentence, the Legislature introduced a concept distinct from the *natural* ordinary high-water mark. Invoking the IGLD of 1955, the Legislature established a specific reference point for the term "ordinary high-water mark." In my view, a basic understanding of the IGLD of 1955 facilitates a construction of this sentence and illuminates the intended distinction between the natural ordinary high-water mark and the ordinary high-water mark.

The IGLD represents "a reference system used for expressing elevations in the Great Lakes area." *State v Trudeau*, 139 Wis 2d 91, 107 n 7; 408 NW2d 337 (1987). A November

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[2] A 1959 Michigan regulation reinforces my conclusion that the Legislature purposefully chose the term "natural" to delimit the state's ordinary high-water mark jurisdiction:

> "Ordinary high water line" shall refer to that *natural* line between the upland and the lake bottom land which persists through periodic changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character from the upland. This character of the soil, surface shape, or vegetation may be somewhat altered during exposure at low stages in the fluctuations of the water levels, but will be reestablished with the return of high stages. When the soil, vegetation, or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occurred had such alteration not taken place. [1959 AACS, R 299.371(a) (emphasis added).]

1991 "update letter" concerning Great Lakes levels authored by the United States Army Corps of Engineers explains the IGLD as follows:

> What is IGLD 1985?
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> Because of movement of the earth's crust, the "datum" or elevation reference system used to define water levels within the Great Lakes-St. Lawrence River system must be adjusted every 25 to 35 years. The current datum is known as the International Great Lakes Datum, 1955 (IGLD 1955). The date of the new datum, 1985, is the central year of the period 1982-1988 during which water level information was collected for preparing the datum revision.
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> Why is a revised datum required?
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> Water levels gaging responsibility for the Great Lakes-St. Lawrence River system is shared by the United States and Canada. The harmonious use of these waters requires international coordination of many aspects of their management. The most basic requirement for coordinated management is a common elevation reference or "datum" by which water levels can be measured. [US Army Corps of Engineers, Great Lakes Levels, Update Letter No. 76, November 4, 1991, available at <http://www.lre.usace.army.mil/_kd/Items/actions.cfm?action=Show&item_id=3371&destination=ShowItem> (accessed April 20, 2011).]

The "ordinary high-water mark" numbers listed in MCL 324.32502 correspond to each Great Lake's water-surface elevation above sea level, as reported in the 1955 datum. These numbers supply a readily available, unchanging plane of reference for lake elevations, which the Legislature designated "ordinary high-water mark[s]."

I believe it defies logic to equate a static number representing lake-water elevation in 1955 with a "natural" ordinary high-water mark that expressly controls the state's jurisdiction. Instead, the 1955 lake levels and the natural ordinary high-water mark are conceptually distinct. A permanently set elevation linked to 1955 water levels constitutes an artificial location with no connection to "natural" benchmarks. In contrast, the contour of the land surrounding the natural ordinary high-water mark predictably shifts with time, producing ever-changing elevations. Moreover, lake-water elevations above sea level defined by the IGLD embody a vertical plane, while the site of a natural high-water mark suggests a horizontal reference. The natural ordinary high-water mark represents a discernible intersection between the water and the shoreline. But "[t]he most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly." *Hilt v Weber*, 252 Mich 198, 219; 233 NW 159 (1930). Because the topography of the Great Lakes shoreline constantly changes, as wind and waves move sand and soil, a fixed elevation may or may not reflect a location landward of the *natural* ordinary high-water mark. Due to shifting shorelines and varying beach elevations, a static elevation of 579.8 feet may denote the top of a sand dune in one year, while being underwater the next.

Unlike the majority, I credit our Legislature with awareness of the critical difference between a natural ordinary high-water mark impressed on the land notwithstanding varying water levels and shifting shore topography and unchanging numbers signifying lake-water elevations. Consequently, it does not strain my "credulity and common sense to conclude that phrases as similar as 'natural ordinary high-water mark' and 'ordinary high-water mark,' employed within the same statutory paragraph, were intended by the Legislature to encompass" very different meanings. *Ante* at ___. Rather, I believe that the Legislature inserted the word "natural" because it intended to distinguish between an unchanging line in the sand and the reality of our dynamic Great Lakes shorelines. Because a fundamental difference exists between the meanings of the two terms, I cannot accept that the Legislature accidentally inserted the word "natural" into MCL 324.32502 to describe the lands subject to state jurisdiction or that the Legislature inadvertently omitted the word "natural" from the statute's last sentence.

Nor do I find troubling the specter of "serious difficulties concerning *why* the statutory elevations were included in MCL 324.32502 in the first instance." *Ante* at ___. As the majority recognizes, the Legislature employed the term "ordinary high-water mark" elsewhere in the GLSLA. When the Legislature enacted MCL 324.32502 in 1995, the term "ordinary high-water mark" appeared in at least two other sections of the GLSLA: MCL 324.32503(3), as amended by 2002 PA 148 ("The department shall not enter into a lease or deed of unpatented lands that permits drilling for exploration purposes unless the drilling operations originate from locations above and inland of the ordinary high-water mark."), and MCL 324.32513(2)(a)(*ii*), as amended by 2003 PA 163 ("For . . . a permit for . . . the mowing of vegetation in excess of what is allowed in section 32512(2)(a)(*ii*), in the area between the ordinary high-water mark and the water's edge, a fee of $50.00.").[3]

Furthermore, I disagree with the majority's analysis of the portion of the statutory language addressing property rights acquired "by accretions occurring through natural means or reliction." MCL 324.32502. After defining the word "land" in the penultimate sentence of MCL 324.32502 as including "patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the natural ordinary high-water mark," the Legislature added "but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction." The majority opines, "If the [natural ordinary high-water mark] were independent of the listed elevations and defined in accordance with [the DEQ's] interpretation, then the 'reliction exception' would be superfluous because relicted lands would, by definition, fall outside the boundary of the [natural ordinary high-water mark] as defined by [the DEQ]." *Ante* at ___. However, the majority has read out of the statute the words "affect property rights." Littoral owners possess property rights in land

[3] It also seems reasonable to conclude that when the Legislature enacted the GLSLA, it intended that future regulatory provisions would use the ordinary high-water mark instead of the natural ordinary high-water mark. Indeed, this is precisely what occurred when the Legislature enacted MCL 324.32501(b), MCL 324.32512, MCL 324.32512a(3), MCL 324.32513, and MCL 324.32516.

subject to state regulation. Regardless of whether the surface of a property owner's fast land expands with reliction or contracts through erosion, exercise of state regulatory powers does not negate ownership. See Abrams, *Walking the beach to the core of sovereignty: The historic basis for the public trust doctrine applied in* Glass v Goeckel, 40 U Mich J L Reform 861, 899-902 (2007). As the Supreme Court observed in *Glass*, the state's "status as trustee does not permit the state, through any of its branches of government, to secure to itself property rights held by littoral owners." *Glass*, 473 Mich at 694. Relicted land below the natural ordinary high-water mark may remain subject to private ownership. But "land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land." *Nollan v California Coastal Comm*, 483 US 825, 834; 107 S Ct 3141; 97 L Ed 2d 677 (1987) (quotation marks and citation omitted). Just as "public rights may overlap with private title," *Glass*, 473 Mich at 700, the state's regulatory jurisdiction may overlie property rights. In my view, the language "this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction" in MCL 324.32502 means simply that, irrespective of the location of the natural ordinary high-water mark, relicted land remains the property of the fee owner, rather than vesting in the state.

Finally, I agree with Burleson that the use of a fixed elevation enhances predictable regulatory boundaries. Yet by selecting the word "natural," the Legislature opted to link the state's regulatory realm to the reality of an ever-changing environment. In accordance with the Legislature's command that preservation and protection of the Great Lakes must guide interpretation of the GLSLA, I reject the idea that the Legislature intended that an elevation corresponding to the water's edge in 1955 would forever limit the state's ability to protect our beaches.

I would affirm the circuit court's order upholding the DEQ's declaratory ruling.

/s/ Elizabeth L. Gleicher